STATE OF MICHIGAN

COURT OF APPEALS

JAMES DURALL, JR., Plaintiff-Appellant,	UNPUBLISHED March 29, 2011
v	No. 293910 Genesee Circuit Court
HOME-OWNERS INSURANCE COMPANY, Defendant-Appellee.	LC No. 08-088948-CK

Before: SHAPIRO, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff, James DuRall, Jr., appeals the trial court's order that granted summary disposition to defendant, Home-Owners Insurance Company. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Plaintiff filed this action for breach of contract for defendant's failure to pay benefits under a homeowner's insurance policy covering a home at 233 East Eddington Avenue in Flint. Plaintiff was purchasing the house from the property owner, Ruth Collie, under a land contract. Plaintiff applied for homeowner's insurance through defendant on August 30, 2007 and the policy was issued on September 10, 2007. A fire destroyed the home during the night of October 31, 2007.

Following discovery, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). According to defendant, the day after plaintiff reported the fire, defendant sent plaintiff a letter that explained how he must proceed with his insurance claim, instructed him to review the terms of his policy, and also stated that plaintiff must file a sworn statement in proof of loss within 60 days of the fire. The letter further stated that the deadline for the proof of loss could only be extended in writing by defendant. Despite this notification, plaintiff did not submit a proof of loss by the deadline of December 31, 2007. Rather, plaintiff submitted the proof of loss through his attorney on March 26, 2008. Defendant argued that plaintiff cannot recover for the denial of his claim for benefits because of his failure to file a timely, sworn statement in proof of loss.

In response to defendant's motion, plaintiff argued that he never received correspondence from defendant about his obligations for filing a claim. Plaintiff also denied ever receiving a

copy of his insurance policy and claimed he had no knowledge of his obligation to file a proof of loss statement by the 60-day deadline. Plaintiff further asserted that defendant should be estopped from claiming his proof of loss was untimely because defendant made partial benefit payments to him both before and after the proof of loss deadline and plaintiff provided the "functional equivalent" of a proof of loss and defendant was able to thoroughly investigate the claim.

In reply, defendant argued that its ongoing investigation of plaintiff's claim did not waive defendant's rights under the policy. Defendant also submitted a copy of a document entitled "Property Advance Payment/Non-Waiver Agreement" that plaintiff signed on December 20, 2007. The document stated that defendant would advance partial benefits to plaintiff for personal property. The document further stated as follows:

> It is understood our investigation is not complete and it may be later established that there is no legal obligation for payment under your policy. Issuance of advance payments by the company is not an admission of liability. Acceptance by you does not represent a satisfaction or release of all claims. It is understood this advance shall not benefit any third parties in any manner whatsoever.
>
> This is not a PROOF OF LOSS as required by the policy. A PROOF OF LOSS must still be submitted to the company within 60 days of the date of loss stated above.
>
> This agreement or payment of the advance is not intended to change or modify any of the conditions, terms, provisions or requirements contained in the policy. Any obligations or legal rights which may now or hereafter be available to you or the company are reserved. [Emphasis in original.]

Following oral argument on February 23, 2009, the trial court granted defendant's motion for summary disposition on the ground that plaintiff failed to timely file a sworn proof of loss.

II. ANALYSIS

The trial court granted summary disposition to defendant pursuant to MCR 2.116(C)(10). As this Court explained in *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 433; 773 NW2d 29 (2009):

> We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all the evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 119-120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120.
>
> Plaintiff's insurance policy states:

1. PROPERTY

If a covered loss occurs, the **insured** must:

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c. make an inventory of all damaged and destroyed property; show in detail quantities, costs, actual cash value and amount of loss claimed; attach to the inventory all available bills, receipts and related documents that substantiate the figures in the inventory.

d. send to **us**, within 60 days after the loss, a proof of loss signed and sworn to by the **insured**, including:

(1) the time and cause of loss;

(2) the interest of **insureds** and all others in the property;

(3) actual cash value and amount of loss to the property;

(4) all encumbrances on the property;

(5) other policies covering the loss;

(6) changes in the title, use, occupancy or possession of the property;

(7) if required, any plans and specifications of any damaged building or fixtures; and

(8) the inventory of all damaged or stolen property required by 1.c. above.

As discussed, defendant maintains that, on November 2, 2007, the day after plaintiff reported the fire, defendant mailed to plaintiff's address a letter that included instructions on how to proceed with a claim for benefits under his homeowner's policy. The letter stated that plaintiff must prepare a property inventory and a sworn statement in proof of loss. The letter specifically states that plaintiff must submit the proof of loss within 60 days of the fire. Defendant included property inventory and proof of loss forms for plaintiff to submit. Plaintiff claims he did not receive the letter from defendant. However, as set forth above, the property inventory and proof of loss requirements are also set forth in the policy itself. Defendant asserts that plaintiff was given a copy of the homeowner's insurance policy on September 10, 2007, when the policy was issued. Again, however, plaintiff claims he did not have a copy of the policy and was unaware of his obligation to file a sworn proof of loss.

Our courts have held that, "[a]lthough defendant claims not to have read the insurance policy prior to the accident, he nevertheless is held to a knowledge of its terms and conditions." *Auto Owners Ins Co v Zimmerman*, 162 Mich App 459, 461; 412 NW2d 925 (1987). Further,

this Court reiterated in *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 29; 761 NW2d 151 (2008):

> [T]he law applied in Michigan leaves no room to doubt that as a general rule, an insured must read his or her insurance policy. As the Supreme Court summarized in *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999): " 'This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.' " (Citation omitted.)

Moreover, as this Court explained in *Casey v Auto Owners Ins Co*, 273 Mich App 388, 394-395; 729 NW2d 277 (2006):

> It is well established that an insured is obligated to read his or her insurance policy and raise any questions about the coverage within a reasonable time after the policy is issued. Consistent with this obligation, if the insured has not read the policy, he or she is nevertheless charged with knowledge of the terms and conditions of the insurance policy.

Accordingly, plaintiff's claim that he did not know about the policy term requiring him to submit a sworn proof of loss within 60 days is unavailing.

Moreover, when plaintiff received an advance payment from defendant to cover his rent after his house was destroyed by the fire, plaintiff signed the non-waiver agreement that, again, specifically stated: "This is not a PROOF OF LOSS as required by the policy. A PROOF OF LOSS must still be submitted to the company within 60 days of the date of loss stated above." (Emphasis in original.) Plaintiff signed the agreement on December 20, 2007, eleven days before the deadline for filing the proof of loss. In addition to the terms of the policy, this document placed plaintiff on notice of his obligation to submit the sworn proof of loss within the 60-day period.

As this Court explained in *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 145-146; 433 NW2d 380 (1988):

> The purpose of provisions in an insurance contract requiring the insured to give prompt notice is to allow the insurer to make a timely investigation in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. [*Wendel v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971).] The filing of a proof of loss within sixty days allows the insurer to determine with certitude that the insured demands payment under the policy, the amount of the claim, and the question of its liability.

It is well-settled that, generally, "the failure to file a signed and sworn proof of loss within sixty days of the loss bars recovery on a claim without regard to whether the insurer is prejudiced by such failure." *Dellar*, 173 Mich App at 145.

In *Dellar*, this Court ruled that the plaintiff could submit to the jury a question of fact about whether the insurance company waived or was estopped from relying on the plaintiff's

failure to submit her sworn proof of loss by the contractual deadline. *Id*. at 147-148. However, the Court based its ruling on the fact that, before the time limit, plaintiff had twice requested a copy of her insurance policy, but the insurer failed to send her a copy until after the deadline passed. The *Dellar* Court also relied on *Struble v National Liberty Ins Co of America*, 252 Mich 566; 233 NW 417 (1930), in which the plaintiff asked for a copy of his policy, but did not receive one from his insurance agent and was unaware that he needed to file a proof of loss until after the deadline passed. This case differs from both *Dellar* and *Struble*. Here, plaintiff never asked for a copy of his insurance policy and he signed the non-waiver agreement, which explicitly placed him on notice of his need to timely submit a sworn proof of loss.

The Court in *Dellar* further observed that, under the facts of that case, a proof of loss would have added "nothing to the context of this case" because, in light of the documents the plaintiff submitted and the insurer's own investigation, there already existed a "functional equivalent" of a proof of loss. *Dellar*, 173 Mich App at 148. This is not the case here because, as defendant points out, by the December 31, 2007 deadline, plaintiff had only submitted a partial property inventory and he had not obtained replacement estimates, he did not submit receipts for his personal property, he did not submit a total loss tally, and he had not made a demand for payment of a sum certain. Importantly, the Court in *Dellar* did not merely hold that it was sufficient that there was a "functional equivalent" of a proof of loss based on the information submitted by the insured and the investigation conducted by the insurer. Again, the Court ruled that the plaintiff's breach of contract claim could go to the jury because, not only was there a "functional equivalent" of a proof of loss, but the plaintiff also was denied a copy of her policy twice upon request and had no notice of the proof of loss filing deadline before it passed. *Id*. at 147-148.

Nonetheless, plaintiff asserts that defendant waived or is estopped from relying on the proof of loss deadline because defendant paid him advances toward his rent and personal expenses both before and after the proof of loss deadline.

> A waiver is a voluntary relinquishment of a known right. Estoppel is based on some misleading conduct or language of one person which, being relied on, operates to the prejudice of another, and is applied to the wrongdoer by the court in denial of some right, which otherwise might exist, to prevent a fraud. [*Dellar*, 173 Mich App at 138, quoting *Dahrooge v Rochester-German Ins Co*, 177 Mich 442, 451-452; 143 NW 608 (1913).]

Again, when defendant paid plaintiff advance partial benefits on December 20, 2007, plaintiff signed the non-waiver agreement that stated he must submit a timely proof of loss. Further, in the non-waiver agreement, defendant was explicitly *reserving* its rights under the policy and notifying plaintiff of the need to file a timely proof of loss, notwithstanding the partial benefit payment. This negates any claim of waiver or misrepresentation. Moreover, that defendant provided benefit payments to plaintiff after the proof of loss deadline but before its formal denial of his insurance claim does not amount to a waiver or support the application of estoppel.

Logically, any actions taken by defendant *after* plaintiff missed the proof of loss deadline have no bearing on plaintiff's failure to comply with the deadline before it expired. For these reasons, the trial court correctly granted summary disposition to defendant. [1]

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly

[1] Because this issue is dispositive, we need not address defendant's alternative claim that the trial court should have granted its motion for summary disposition on other grounds.